No. 72-851

IN THE

Supreme Court of the United States

October Term, 1972

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE C. SHATTUCK
BOND, SCHOENECK & KING
Attorneys for Petitioners
One Lincoln Center
Syracuse, New York 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(5646)

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

Supreme Court of the United States

October Term, 1972

No.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit and the dissenting opinion of Judge Lumbard (Appendix A, infra, p. 14) are reported at 465 F.2d 916 (1972). That Court's denial of the Petitioners' Petition for Rehearing and Suggestion for Determination by Court En Banc (Appendix B, infra, p. 30) is not yet officially reported. The opinion of the United States District Court for the Northern District of New York (Appendix C, infra, p. 31) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1972. The Oneida Tribes then filed a timely petition for rehearing, which was denied on September 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

I. When Congress enacted 28 U.S.C.A. 1362 (to extend the jurisdiction of the Federal District Courts to entertain suits brought by recognized Indian Tribes on questions arising under the Constitution, laws or treaties of the United States), did Congress intend to include in this jurisdictional grant claims by a recognized Tribe involving land of which the Tribe had been dispossessed in violation of federal law and treaties, which claims, pursuant to prior Congressional statutes, may not be litigated in a state court?

II. Does a cause of action, exclusively founded on United States treaties with an Indian Tribe and United States laws designed to protect and preserve treaty lands for the Indian Tribe, arise under the Constitution, laws and treaties of the United States?

STATUTES AND TREATIES INVOLVED

A. The Treaties Invoked

The complaint invokes the following treaties enacted pursuant to Article IX of the Article of Confederation and Article I, Section 8, of the Constitution (quoted in part):

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

B. Statutes Invoked

25 U.S.C.A. 177

§177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to

the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. §2116.

25 U.S.C.A. 194

§194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. §2126.

STATEMENT

The Oneida Indian Nation of New York and The Oneida Indian Nation of Wisconsin brought this suit against the Counties of Oneida and Madison, located in the State of New York (Complaint, Appendix D, infra, p. 42 , Amended Complaints, Appendices D-1 and D-2, infra, pp. 62 & 63).

Petitioners contend that the respondents occupy lands which the State of New York obtained in 1795 in violation of the Indian Non-Intercourse Act, 1 Stat. 137 (1790),

later Rev. Stat. §2116, and now 25 U.S.C. §177. The 1790 Act provided, inter alia:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Prior to the contested cession in 1795, the Petitioners had a large Reservation in Upstate New York. In 1795, representatives of the State of New York negotiated a "treaty" with the Petitioners whereby the Petitioners ceded a large portion of their land, for what the complaint alleges to be an unfair and inadequate consideration. This 1795 "treaty" was obtained without federal consent and was never ratified in any way by the United States, and, consequently, was in violation of the above cited Indian Non-Intercourse Act and the treaties invoked in the complaint.

Petitioners in this suit claim damages for the respondents' occupancy of the petitioners' land for the period January 1, 1968 to December 31, 1969. The fair rental value of such premises for this period amounts to at least $10,000.00 exclusive of interest and costs.

In the United States District Court for the Northern District of New York, petitioners asserted jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1362, and other jurisdictional provisions which the petitioners do not ask this Court to review.

The District Court dismissed the complaint for lack of jurisdiction. In affirming, the Court of Appeals reasoned that the complaint by the petitioners was an action "basically in ejectment" and therefore a well-pleaded complaint need not contain an allegation of the Oneidas' source of title. Consequently, held the Court, the action did not "arise under" the Constitution, laws, or treaties of the

United States (28 U.S.C. §1331), even though the petitioners' assertion of title in their complaint is founded on a federal statute or treaty. The Court of Appeals concluded that the "arising under" language of §1362 should be interpreted similarly to the "arising under" language of §1331, and hence under §1362 there was likewise no federal question. Judge Lumbard dissented, suggesting that the "arising under" language of §1362, passed into law in 1966, should not necessarily be interpreted as the same language in §1331. Judge Lumbard also noted that since the case would turn exclusively on interpretation of federal law and federal treaties, this case "should be considered to arise under the laws, as well as the treaties of the United States."

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' decision, denying federal court jurisdiction in this case, will have a vital adverse impact on the availability of a judicial forum for Indian Tribes throughout the United States to litigate claims for lands of which they are dispossessed. Consequently, the decision is most appropriate for review by this Court. By concluding that an action does not "arise under the Constitution, laws or treaties of the United States" (28 U.S.C. §1362) when an Indian Tribe sues for land of which they were deprived in violation of federal law, the Court of Appeals effectively denied the petitioners and all other Indian Tribes with similar claims any judicial forum in which to litigate such claims.

Since the transaction challenged in this case occurred in 1795, the State Courts of New York are precluded from entertaining this suit. 25 U.S.C.A. §233, which granted to New York all civil jurisdiction over Indians and Indian Tribes, contains the following proviso:

> "that nothing herein shall be construed as conferring jurisdiction on the courts of the State of New

York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

Similarly, Indian Tribes in other states cannot resort to state courts to protect Reservation lands. Sections 28 U.S.C.A. §1360 and 25 U.S.C. §1322 impose on certain states and permit other states to assume civil jurisdiction over actions to which Indians are parties. However, such statutes contain a proviso, like that in 25 U.S.C.A. 233, to the effect that the state jurisdiction therein authorized or imposed does not confer on the states jurisdiction to adjudicate the right or possession of property held in trust by the United States for Indians or property subject to a restriction against alienation imposed by United States law. (28 U.S.C. §1360(6); 25 U.S.C.A. §1322(6).) These statutes confirm prior case law precluding state courts from adjudicating claims involving Indian land. U.S. v. Minnesota, 305 U.S. 382, 59 S. Ct. 292 (1938); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 (1959).

The dire consequences of the decision below on Indian Tribes throughout the country necessitate a review of that decision by this Court and present a need for interpretation of 25 U.S.C.A. 1362.

The petitioners urge this Court review the legal assumption of the Court of Appeals that the "arising under" language of 28 U.S.C. §1362 must, of necessity, be subject to the case law interpreting the same language in 28 U.S.C. §1331.

The legislative history of 28 U.S.C. §1362 indicates that Congress intended to confer by §1362 a more generous grant of jurisdiction than the interpretation of the "arising under" language of §1331 permits.

On characterizing this suit under federal treaties and statutes as an "action in ejectment", because the petitioners were not in possession of the disputed land at the time

of the suit, the Court of Appeals then invoked the "well pleaded complaint" rule of 28 U.S.C. §1331 to dismiss the case. The Court reasoned that the petitioners' source of title (federal treaties) and their asserted breach of federal law (25 U.S.C. §177) need not be shown on the face of the complaint.

The petitioners contend that Congress did not intend the restrictive "well pleaded complaint" rule of §1331 to accompany the 1966 legislative enacting 28 U.S.C. §1362. Taken in the context of 25 U.S.C.A. 177, 194, and 233, and its own legislative background, section 1362 merits a broader interpretation of what is "arising under" the laws and treaties of the United States. U. S. Code Congr. & Adm. News 1966, pp. 3145-3149. For instance, the then Deputy Attorney General advised the Senate that the section would cover "actions to set aside patents". Id. p. 3149.

This Court has before declined to allow long-standing judicial interpretation of particular language to be automatically transposed as the interpretation of the same language in a different statute, particularly when the two statutes containing the same phraseology were enacted to achieve different goals. U.S. v. Davis, 370 U.S. 65, 82 S. Ct. 1190 (1962).

As Judge Lumbard concludes in his dissenting opinion, "§1331 has long been considered less generous than the constitutional grant." Compare Osborn v. Bank of United States, 9 Wheat. 738 (1824), with Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) and Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911). Consequently, the "well pleaded complaint" rule as applied under 28 U.S.C. §1331 is not constitutionally required as the interpretation of 28 U.S.C. §1362.

Petitioners urge this Court review the automatic adoption by the Court of Appeals of the "well pleaded complaint" rule of 28 U.S.C. §1331 as the correct interpretation of

28 U.S.C. §1362. Petitioners believe the question is of broad national importance and that the interpretation of Judge Lumbard is correct.

II.

The complaint bases its claim on three federal treaties guarantying possession of Reservation land, on two federal statutes designed to protect Indian land, and upon federal policy as stated by the President of the United States. The treaties, statutes, and policy are invoked in and made a part of the complaint.

The petitioners' cause of action meets the tests of a federal claim set forth in International Association of Machinists v. Central Airlines, 372 U.S. 682, 83 S. Ct. 683 (1953), and Smith v. Kansas City Title and Trust Co., 255 U.S. 180, 41 S. Ct. 243 (1920); as more recently followed in Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F. 2d 486 (2 Cir. 1968). This is not a case where the federal aspect is remote or collateral, or blended with questions of state law. Here the petitioners are invoking the promised help of the United States in the form of a cause of action created basically by federal treaties and laws.

The Second Circuit has distinguished this case from a prior decision on similar facts, Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (2 Cir. 1958), on the ground that the Tuscarora Indians had possession and the Oneidas do not. While there is some question about whether the distinction is factually correct*, the thrust of the opinion below is that possession, or lack of it, is the key factor. It is petitioners' contention that an unlawful taking or acquisition of an Indian Tribe's possession does not of itself deprive such Tribe of the protection of federal treaties, laws and policies.

*The Tuscarora opinion indicates that the Indians therein had already lost their right to possession due to filing of a condemnation map under Section 30 of the New York Highway Law.

The question of whether possession must be alleged in a case under federal treaties guarantying possession represents an issue which affects the interests of Indians in every part of the United States. If the decision of the Court Below is correct, then it appears that an Indian Tribe or Nation, once ousted of possession of its Reservation, has no recourse to federal courts on its own behalf but must rely compeltely upon officials of the United States Government to present its case. As has been demonstrated in many cases, including the current one, the United States is unwilling or unable for one reason or another to help.

The Second Circuit's decision would leave American Indians without remedy if once ousted or removed from their lands. They would have no forum in which to present a plea for application of laws, treaties, and policy of the United States which guarantee them the possession of their lands.

The present vitality of the treaties invoked in the complaint was affirmed in 1960 by the Supreme Court in the Tuscarora controversy. The Supreme Court explicitly distinguished between the type of ownership of the Tuscarora Indians (not protected by treaty) and that of the Oneida Indians (protected by treaty) in Footnote 18, 362 U.S. 120, 80 S. Ct. U.S. 556, 557, (1960) as follows:

> "By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty of Fort Harmar of 1780 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the lands in question."

The Petitioners' Reservation involved herein is that very land "about 200 miles east" of the Tuscarora land. The treaties referred to in Footnote 18 are two of the three treaties invoked in the Petitioners' complaint.

The Supreme Court in Tuscarora went on to hold that

the condemnation of the Tuscarora land by the Federal Power Commission did not violate treaties because no treaty applied to protect the Tuscarora land in question. Id. 362 U.S. 124, 80 S. Ct. 558 (1960). It follows that the Oneidas' land is protected by the treaties invoked in the complaint and that such treaties create their own federal cause of action; or at least that the claim "arises under" the treaties.

A further important element of the law on federal court jurisdiction over New York Indians is found in 25 U.S.C.A. 233, which reads in part as follows:

> ". . . nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

The foregoing clause was not in the bill (S.192) as originally introduced in Congress. It was added at the request of certain New York Indians. See Congressional Record—House for July 27, 1950, page 11400. The explanation given by Congressman Morris therein shows clearly that Congress assumed that Indian land claims arising before September 13, 1952 could be heard in federal courts. See following excerpt:

> "These amendments will preserve those -(treaty)- rights. Then in addition thereto they will preserve their right to go into the United States courts in regard to claims that they might have growing out of any transactions in regard to land dealings and so forth, with the State of New York. In other words, Mr. Speaker, I believe that these particular amendments are such that there can be no real objection now."

The Congressional Record—House for August 14, 1950, at page 12664, contains further explanation:

> "In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision."

Therefore, Congress, in enacting 25 U.S.C.A. 233, clearly intended and believed that land claims involving New York Indian lands and dating prior to September 13, 1952 should be federal questions, to be heard by federal courts.

This assertion is reinforced by 25 U.S.C.A. 194, which was specifically pleaded in the Petitioners' complaint, paragraph 7. If neither the federal nor state courts have jurisdiction where the Indian is not in possession, what is the purpose of 25 U.S.C.A. 194, which refers to burden of proof in trials about the right of property "whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"? [Emphasis added.]

It does not seem that Congress would have let 25 U.S.C.A. 194 remain on the books for 138 years to govern burden of proof in a cause of action that does not exist because of lack of possession.

The long history of federal treaties, laws, court decisions, and governmental activity in behalf of Indians makes it clear that the federal interest in the result of such (Indian) cases is so great they they should be controlled by federal common law. As stated by the Second Circuit in the Tuscarora case, at 257 F. 2d 885, 891:

> "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes

> in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. 233, pointed up and reaffirmed its paramount authority over Indian tribal lands." p. 891.

Petitioners believe the "nice pleading rules" are complied with herein because the complaint on its face shows why this is not a mere local ejectment action but rather a well-pleaded case arising under the:

- treaties: (see paragraph 4 of complaint);
- statutes: (see paragraphs 6 and 7 of complaint); and
- laws and policy: (see paragraph 5 of complaint)

of the United States as is required by 25 U.S.C.A. 1331.

Because so many Indian tribal and land rights are founded on federal treaties, the decision here will be of significance to many generations to come.

CONCLUSION

This petition presents questions regarding the scope of 28 U.S.C.A. 1362 and the efficacy of federal treaties; and these questions affect, and will affect, the integrity of Indian Reservation lands throughout the United States.

For the reasons set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

George C. Shattuck
Bond, Schoeneck & King
Attorneys for Petitioners
One Lincoln Center
Syracuse, New York 13202

December 1, 1972.

Appendix A — Opinion of Court Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 720—September Term, 1971.

(Argued June 5, 1972 Decided July 12, 1972.)

Docket No. 72-1029

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Appellants,

v.

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,

Appellees.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD and MULLIGAN, *Circuit Judges.*

Appeal from an order of the District Court for the Northern District of New York dismissing, for lack of federal jurisdiction, a complaint by two Indian nations challenging a 1795 sale of tribal lands as violating Indian treaties and the Indian Non-Intercourse Act, 1 Stat. 137 (1790), now 25 U.S.C. § 177.

Affirmed.

Appendix A — Opinion of Court Below.

GEORGE C. SHATTUCK, Esq., (Bond, Schoeneck & King, Syracuse, N. Y., of Counsel), *for Appellants.*

WILLIAM L. BURKE, Esq., Attorney for the County of Madison, Hamilton, N. Y., *for Appellee, County of Madison.*

ROCCO S. MASCARO, Esq., (Raymond M. Durr, Esq., Attorney for the County of Oneida, Utica, N. Y., of Counsel), *for Appellee, The County of Oneida.*

(Charles Donaldson, Esq., of Counsel, American Civil Liberties Union, Syracuse, N. Y.,

and

David H. Getches, Esq., and Peter J. Aschenbrenner, NATIVE AMERICAN RIGHTS FUND, Boulder, Colorado, of Counsel), *for Appellants, Amicus Curiae.*

FRIENDLY, *Chief Judge:*

This appeal from an order of the District Court for the Northern District of New York, dismissing a complaint by two Indian nations for want of federal jurisdiction, takes us back to the early days of the Republic. Although on the surface the controversy seems highly appropriate for federal cognizance, that claim shatters on the rock of the "well-pleaded complaint" rule for determining federal question jurisdiction, and we find no other basis that would permit a federal court to entertain the action.

The principal allegations of the complaint are as follows: The plaintiffs are The Oneida Indian Nation of New York State, and Indian Nation or Tribe with its principal

reservation in Oneida and Madison Counties, New York, and The Oneida Indian Nation of Wisconsin, an incorporated Indian Nation or Tribe with its principal reservation in Wisconsin. The defendants are the two New York counties just mentioned. After alleging the required jurisdictional amount and diversity of citizenship,[1] the complaint dips into history. Prior to the American Revolution the Oneidas owned some 6,000,000 acres of land in central New York. In contrast to other New York Indian tribes, they fought on the side of the colonists. See U.S. Dept. of Interior, Federal Indian Law 966-67 n. 1 (1958) [hereinafter cited as Federal Indian Law]. In recognition of this, a number of treaties were made confirming them in the possession of their lands, except such as they had sold or might choose to sell.[2] To implement these and other treaty obligations, the first Congress adopted the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. § 2116, and now 25 U.S.C. § 177. This provided, *inter alia:*

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

---

1 Following defendants' motion to dismiss the complaint on numerous grounds, one of which was lack of subject-matter jurisdiction, plaintiffs cross-moved to amend the complaint, see note 3 *infra*, F.R.Civ.P. 15(a), to allege that "Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws." Civil rights jurisdiction, 42 U.S.C. § 1983, 28 U.S.C. § 1343, was also alleged. The district court granted plaintiffs' motion to amend, and further ordered that defendants' motion to dismiss be deemed made against the amended complaint.

2 See Treaty of October 22, 1784, 7 Stat. 15; Treaty of January 9, 1789, 7 Stat. 33; Treaty of November 11, 1794, 7 Stat. 44; Treaty of December 2, 1794, 7 Stat. 47. See Federal Indian Law 965, 970-72.

President Washington explained the statute to a delegation of Seneca Indians as follows:

> "Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

Prior to adoption of the statute, the Oneidas, in the Treaty of Fort Stanwix in 1788, between themselves and the State of New York, had ceded over 5,000,000 acres of their lands to New York State for what now seems an absurdly small consideration. They had reserved about 300,000 acres in Oneida and Madison Counties. In 1795 representatives of New York State procured the cession by "treaty," see Federal Indian Law 513 n.6; cf. *Seneca Nation* v. *Christy*, 162 U.S. 283 (1896), of a large portion of these lands, again for what now seems an inadequate consideration and allegedly was so even then. The complaint asserts that no federal consent was obtained, that no United States Commissioner was present at the negotiation or execution of the purported treaty, and that the United States has never approved or ratified it. Part of the premises deeded in 1795 became the property of the defendant counties which currently occupy them for buildings, roads or other public improvements. "By reason of such occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest." [3] Plaintiffs demanded judgment for at

3 The quoted language was added, in an amendment as a matter of course, F.R.Civ.P. 15(a), as ¶22 of plaintiffs' complaint; ¶18 of the original and amended complaints alleges in part that "By reason

least $10,000.00 "plus such other and further monetary damages as the Court may deem just."

Appealing from a dismissal of the complaint for lack of federal jurisdiction, the Oneidas assert three different bases —the existence of a federal question, diversity of citizenship and, surprisingly, a claim under the Civil Rights Act.

I.

As stated, on a surface reading the complaint would seem to state a claim which "arises under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331(a), or to institute an action "by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1362.[4] Decision would ultimately turn on whether the deed of 1795 complied with what is now 25 U.S.C. § 177 and what the consequences would be if it did not.[5] How-

---

of said occupancy [by defendants] plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least $10,000, exclusive of costs and interest." Whether these claims are viewed as distinct causes of action, or simply as alternative statements of an appropriate measure of damages on the same cause of action, the outcome is equally unavailing to plaintiffs. While plaintiffs only claimed rental value for a two-year period, they sought to preserve their claim for rental value for both prior and subsequent years.

4 The jurisdictional issue in this case is the same under either section. Apart from the use of the same language as in § 1331, the legislative history makes clear that the sole purpose of § 1362 was to remove any requirement of jurisdictional amount. See 1966 U.S. Code Cong. & Adm. News 3145-49. The decision, *Yoder* v. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F.2d 360 (9 Cir. 1964), which the statute aimed to overrule, involved a claim that would have been assertable under § 1331 but for the requirement of jurisdictional amount.

5 Although the complaint makes copious reference to various Indian treaties, see note 2 *supra*, which are indeed considered to constitute "treaties" within applicable jurisdictional legislation, *Worcester* v.

ever, this alone does not establish the existence of federal question jurisdiction. "Under existing law it is well established that federal question jurisdiction is present only if the reliance on a federal right appears on the face of the well-pleaded complaint. The first Supreme Court decision to construe the Act of 1875 [creating general federal question jurisdiction] applied such a rule, citing Chitty to determine what allegations were proper, *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199 (1877), and the rule has been insisted upon ever since." ALI Study of the Division of Jurisdiction between State and Federal Courts, Commentary on § 1311, p. 169 (1969). One effect of the rule is to bar "access to federal court on the basis of allegations which are not required by nice pleading rules," *Id.* at 169-70, notably in cases involving rights to land.

Although plaintiffs' only specific claims for relief are for two years' rental value as a result of defendants' occupancy, or damages for denial of plaintiffs' right of use, see note 3 *supra*, their success depends upon establishment of their right to possession, see *Willis* v. *McKinnon*, 178 N.Y. 451 (1904); *Crawford* v. *Town of Hamburg*, 19 App. Div. 2d 100, 241 N.Y.S.2d 357 (1963), and the action is thus basically in ejectment. As to this, a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question even when a plaintiff's claim of right or title is founded on a federal statute, patent or treaty. *Florida Central Railroad* v. *Bell*, 176 U.S. 321 (1900); *Filhiol* v. *Maurice*, 185 U.S. 108 (1902); *Filhiol* v. *Torney*, 194 U.S. 356 (1904); *Taylor* v. *Anderson*, 234 U.S. 74 (1914); *White* v. *Sparkhill Realty Corp.*, 280 U.S. 500 (1930). These decisions were followed

---

Georgia, 31 U.S. (6 Pet.) 515, 541 (1832), see Federal Indian Law 138-44, it does not make clear how the deed was in breach of them. However, we need not pursue the point since the complaint clearly does allege that the deed was executed in violation of a federal statute.

and applied by this court in *Deere* v. *St. Lawrence River Power Co.*, 32 F.2d 550 (2 Cir. 1929).[6]

The frequently cited decision in *Taylor* v. *Anderson*, *supra*, written for a unanimous Court by Mr. Justice Van Devanter, who spoke with particular authority on federal jurisdiction, is directly in point. The complaint in an action in ejectment "alleged with much detail that the defendants were asserting ownership in themselves under a certain deed and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians." 234 U.S. at 74-75. This was held not to state a claim arising under the laws of the United States, since all that *needed* to be alleged was "that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in a sum named." *Id.* at 74.[7] It was of no moment that the defendants might and probably would defend on the basis of the deed, which the plaintiffs would then challenge as invalid under federal legislation. Jurisdiction "must be determined from what *necessarily* ap-

---

6 Recognizing that all the cited cases were decided before adoption of the Federal Rules of Civil Procedure in 1938, we have considered whether the binding force of these decisions could have been affected by the Rules, more particularly by Rule 8(a) with respect to the complaint. We do not see how this result could ensue. The objective of Rule 8(a) was to make complaints simpler, rather than more expansive. *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Moreover, the rule-making statute, 48 Stat. 1064 (1934), provided that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant," and Rule 82 directs that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." *Snyder* v. *Harris*, 394 U.S. 332, 337-38 (1969), is a recent and pertinent application of Rule 82.

7 Judge Port correctly held that only such allegations are needed under New York law. See *Weiss* v. *Goffen*, 26 Misc.2d 988, 207 N.Y.S.2d 163 (Sup. Ct. 1960).

pears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of [sic] avoidance of defenses which it is thought the defendant may interpose." *Id.* at 75-76. (Emphasis supplied).

Plaintiffs are not aided by decisions of this court on which they heavily rely. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F.2d 885 (2 Cir.), *cert. denied*, 358 U.S. 841 (1958), was not an action in ejectment by Indians who were out of possession but a suit for an injunction by Indians who were in possession. In such an action, as in the case of a bill to remove a cloud on title, *Hopkins* v. *Walker*, 244 U.S. 486 (1917),[8] a complete statement of plaintiff's claim to relief is appropriate. *Ivy Broadcasting Co.* v. *American T. & T. Co.*, 371 F.2d 486 (2 Cir. 1968), characterized in appellants' brief as "directly on point," is even further from the mark. The significant holding there was that a case could be regarded as arising under a law of the United States even though this was "federal common law" rather than a statute, a view recently affirmed by the Supreme Court, *Illinois* v. *City of Milwaukee*, U.S. , (1972), 40 U.S.L.W. 4439, 4442. Plaintiffs do not need to resort to that doctrine, since the 1794 statute, now 25 U.S.C. § 177, would be a law of the United States on any basis; their difficulty is that, on the rather technical view taken by the Supreme Court, their action does not "arise" thereunder.

We have considered the possibility of sustaining the complaint on a different ground, not suggested by the

8 But not in the case of a suit to quiet title, *Shulthis* v. *McDougal*, 225 U.S. 561 (1912). As has been well said, "It would be very surprising if this ancient lore as to the forms of action should correspond to any functional justification for federal question jurisdiction," ALI Study, *supra*, at 170.

plaintiffs, but find this also to be precluded. Article 15 of the New York Real Property Actions and Proceedings Law provides that any person claiming an estate or interest in real property may maintain an action against any other person "to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make," § 1501. Contrary to the common law, this permits an action to remove a cloud from title to be brought by a person not in possession. See N.Y. Real Property Actions and Proceedings Law § 1515; *Burke* v. *Suburban Mortgage Corp.*, 43 Misc. 2d 1077, 252 N.Y.S. 2d 911 (Sup. Ct. 1964).

However, even if we were to make the unlikely assumption that the New York legislature intended this remedy to be available to Indian tribes, and could properly make it so in a case like this, see note 9 *infra*, plaintiffs can gain nothing from it. It is settled that federal courts may not apply state statutes expanding equity jurisdiction beyond that prevailing when the Constitution was adopted. This is no technical quibble but a rule deemed to be required by the Seventh Amendment's guarantee of jury trial in actions at law. *Whitehead* v. *Shattuck*, 138 U.S. 146 (1891), which was cited with approval and reaffirmed in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 105-06 (1945), is almost directly in point. An Iowa statute gave any claimant, whether in or out of possession, the right to bring an action in equity to quiet title. The Court upheld the sustaining of a demurrer to such a suit in federal court when the defendant was in possession, since the plaintiff had an adequate remedy at law in federal court. While the decision relied on § 16 of the Judiciary Act of 1789 (later Rev. Stat. § 723 and

28 U.S.C. § 384 (1940 ed)), which limited suits in equity to cases in which there was no "plain, adequate and complete remedy" at law, and that statute was repealed in 1948 as obsolete in view of the merger of law and equity under the Federal Rules of Civil Procedure, 62 Stat. 992, the principle remains intact. *Cf. Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 382 nn.26, 27 (1949); *Potwora* v. *Dillon,* 366 F.2d 74, 77 (2 Cir. 1967).

Plaintiffs might argue against this that here they have no adequate remedy at law in a federal court since, for the reasons stated above, there is no federal question jurisdiction over an action in ejectment and, as will later appear, we find no other sustainable ground of federal jurisdiction. But such an argument would be largely answered by *DiGiovanni* v. *Camden Fire Ins. Ass'n,* 296 U.S. 62, 69-70 (1935). See also *Matthews* v. *Rodgers,* 284 U.S. 521, 525-26 (1932); *Atlas Life Ins. Co.* v. *Southern,* 306 U.S. 563, 568-70 (1939). *DiGiovanni* was a suit in equity in the District Court for Missouri by a New Jersey fire insurance company against citizens of Missouri to cancel two fire insurance policies, one for $3,000 and another for $1,500, as obtained by fraud. The Court held that the action must be dismissed because of the existence of an adequate remedy at law, namely, the defense of actions on the two policies. Although "the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law," 296 U.S. at 69, plaintiff did not demonstrate inadequacy by showing that the jurisdictional amount, then $3,000, would prevent suits on the policies from being maintained in or removed to a federal court. "The statute [28 U.S.C. § 384 (1940 ed.)] forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case

in which they fail to do so." *Id.* at 70. In other words, adequacy of the legal remedy is tested by what a federal court could afford if it had jurisdiction, not by what it could do in the particular case. We do not believe this doctrine would yield even if, as seems not improbable, see note 9 *infra*, the plaintiffs are likewise without a remedy in the New York courts. While we recognize that *DiGiovanni* differs on its facts in that there the prospective defendant at law was the plaintiff in equity, we see nothing in Mr. Justice Stone's opinion that would render this distinction significant.

II.

Appellants also sought to sustain federal jurisdiction on the basis of diversity, 28 U.S.C. § 1332(a). Conceivably this could be either under § 1332(a)(1) conferring jurisdiction in actions between "citizens of different States" or under § 1332(a)(3) conferring jurisdiction in actions between "citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The district court, finding it unnecessary to deal with plaintiffs' claim that The Oneida Tribe of Wisconsin, Inc. was a citizen of Wisconsin, focused on the status of The Oneida Indian Nation of New York. It considered that the most likely analogy was that of an unincorporated association, with the result that, under *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U.S. 145 (1965), jurisdiction under § 1332(a)(1) would be defeated by the New York citizenship of many of the Nation's members. Appellants contend that the analogy is false since an Indian nation is something unique. See Federal Indian Law 341. Even if that be so, it would not avail the plaintiffs under § 1332(a)(1). In *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), Chief Justice Marshall stated the rule of com-

plete diversity to be "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." 7 U.S. (3 Cranch) at 267. This formulation has been followed in subsequent cases. See, *e.g.*, *Florida Central Railroad* v. *Bell*, 176 U.S. 321 (1900); *Hooe* v. *Jamieson*, 166 U.S. 395 (1897); *New Orleans* v. *Winter*, 14 U.S. (1 Wheat.) 91 (1816); see also *Levering & Garriques Co.* v. *Morrin*, 61 F.2d 115, 121 (2 Cir. 1932), *aff'd*, 289 U.S. 103 (1933). The Oneida Nation of New York is surely not a citizen of a state different from New York, and the case under § 1332(a)(1) thus fares no better on plaintiffs' theory than on that of the district judge since the Nation's lack of citizenship in a state other than New York would equally defeat diversity jurisdiction.

Neither can plaintiffs establish diversity jurisdiction under § 1332(a)(3). Even if The Oneida Nation of Wisconsin, Inc. should be regarded as a citizen of Wisconsin for diversity purposes, the Oneida Nation of New York is not "a foreign state." This was established as long ago as *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).[9]

---

9 Since there is no diversity under either § 1331(a)(1) or (a)(3), we have no need to consider whether, as held in *Hot Oil Service, Inc.* v. *Hall*, 366 F.2d 295 (9 Cir. 1966), on the asserted analogy of the rule relating to state "door-closing" statutes, see *Angel* v. *Bullington*, 330 U.S. 183 (1947); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949), diversity jurisdiction would also be precluded by lack of jurisdiction in the courts of New York, if lack there is. The prevailing rule since *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), has been that state courts may not exercise jurisdiction over Indian tribal affairs or claims arising out of or relating to their restricted tribal lands. See Federal Indian Law 363-64. The history of this restriction, the judicial modifications of it, and its current status are discussed in *Williams* v. *Lee*, 358 U.S. 217 (1959). *Williams* reveals that the major

III.

For this case a sufficient answer to the claim of jurisdiction under the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional implementations, 28 U.S.C. § 1343(3), is that, at least with respect to damage suits, a county is not a "person" within the meaning of these statutes, *Monroe* v. *Pape*, 365 U.S. 167 (1961). Beyond that, the claim is impossible to fathom. Apparently it is based on the fact that although § 11-a of the New York Indian Law, added by N. Y. Laws 1958, c. 400, apparently to implement 25 U.S.C. § 233, is broad enough on its face to encompass an action like this, it may not be effective because of the proviso in the latter section restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952, see note 9 *supra*—a matter on which we take no position. Even

---

role, sanctioned by Art. I, § 8, cl. 3 of the Constitution, in modifying this rule designed for the protection of Indians, has been played by Congress. "[W]hen Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester* v. *Georgia* had denied." 358 U.S. at 221.

In that connection the Court referred to 25 U.S.C. § 233, adopted in 1950, 64 Stat. 845, which, with certain qualifications, gave the New York courts jurisdiction "in civil actions and proceedings between Indians or between one or more Indians and any other person or persons," subject, however, to a proviso that the grant should not extend to "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." Appellants point to a statement of the proposer of this proviso on the floor of the House of Representatives, 96 Cong. Rec. 12460 (1950), that in addition to the access to state courts granted by the bill, the Indians "may go into the federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have no objection to such provision." But the bill in fact made no "such provision," and the statement is altogether too tenuous a basis to confer federal jurisdiction not granted by the detailed provisions of Chapter 85 of Title 28.

if the Oneidas' fears should be realized, we fail to understand how a state could be thought to have violated the Constitution in going only so far as federal law permits.

The judgment dismissing the complaint for want of federal jurisdiction is affirmed.[10]

LUMBARD, *Circuit Judge* (dissenting):

I dissent.

The district court had jurisdiction to hear the claims of the Oneida Indians which are based on 1784, 1789 and 1794 treaties between the United States and the Oneidas and five other tribes, known as the Six Nations.

Jurisdiction was conferred by 28 U.S.C. § 1362, enacted in 1966, which provides:

> § 1362. Indian tribes
>
> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. Added Pub. L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

The claims here are based on the allegations that the lands in question, occupied by the Counties of Oneida and Madison, were acquired by the State of New York in 1795 by a so-called "treaty" in violation of the provisions of the 1784, 1789 and 1794 treaties. The demand for relief is

---

10 We are advised that the Oneidas have filed a claim relating to the transaction here at issue with the Indian Claims Commission, 25 U.S.C. § 70a, and have received an award, but that the United States has appealed this to the Court of Claims.

that the Oneidas be recognized as owners of the lands and that they be paid for the use of the lands. As these claims rest on treaties between the Oneidas and the United States, the Oneidas have a right to have them determined in a federal court. The legislative history of the 1966 amendment shows that it was the purpose of the Congress to make sure that the Indian tribes did have a forum to which they could go themselves when government departments and agencies declined to represent them. U.S. Code and Administrative News 1966, Vol. 2, pp. 3145-49. This view is supported by what we held and said in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F.2d 885 (2 Cir.), cert. denied 358 U.S. 841 (1958). I am not persuaded that any federal or state court decision or any state statute can defeat the plain meaning of § 1362 or diminish the stature of our agreements with the Six Nations to make them anything less than treaties of the United States.

The "well-pleaded complaint" rule by which the majority declares this action beyond the cognizance of the federal courts is not necessarily applicable here. The "arising under" language of the Constitution, § 1331, and § 1362 is virtually identical, yet the grant of jurisdiction under § 1331 has long been considered less generous than the Constitutional grant. Compare *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824), with *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908) and *Louisville* v. *Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467 (1911); see Wright, Federal Courts, 54-60. I would hold that the "arising under" language of § 1362 merits the broader interpretation and, consequently, that we should disregard the inhibitory effect of the "well-pleaded complaint" rule, at least until the Supreme Court has passed on the question.

Moreover, the federal interest in seeing that the rights of Indian tribes are heard and adjudicated is so great that they should be controlled by federal common law. Thus

the claims should be considered to arise under the laws, as well as under treaties, of the United States. *Ivy Broadcasting Co.* v. *American Tel. & Tel.*, 391 F.2d 486 (2 Cir. 1968). Whatever merit these claims may have, it seems unthinkable to me that there should be no judicial forum in which they can be brought, be heard and be determined.

For these reasons I would reverse the order of the district court.

Appendix B — Denial of Motion for Rehearing.

72-1029

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs-Appellants,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

DENIED.

September 11, 1972

s/ HENRY J. FRIENDLY, C.J. per WHM
Henry J. Friendly
Chief Judge

s/ WILLIAM H. MULLIGAN
William H. Mulligan, C.J.

I dissent and vote to grant the petition.

s/ J. EDWARD LUMBARD, per WHM
J. Edward Lumbard, C.J.

Appendix C — Opinion of District Court.

[138]

(SAME TITLE).

APPEARANCES:

BOND, SCHOENECK & KING
Attorneys for Plaintiffs
1000 State Tower Building
Syracuse, New York 13202
GEORGE C. SHATTUCK, Esq.
Of Counsel

RICHARD A. FRYE, ESQ.
Attorney for Defendant County of Oneida
Oneida County Office Building
Utica, New York 13501

WILLIAM L. BURKE, ESQ.
Attorney for Defendant County of Madison
29 Lebanon Street
Hamilton, New York 13346

EDMUND PORT, Judge

Memorandum-Decision and Order

This case is before the court on motions made by the defendants for summary judgment dismissing the plaintiffs' complaint.

[139]

Approximately ten different grounds are asserted. Since I have concluded that the complaint must be dismissed for lack of subject matter jurisdiction, it will not be necessary to consider the other grounds urged by the defendants for dismissal.

A brief statement of the procedural posture of the case will help bring the jurisdictional problem it presents into focus. The complaint was amended on two occasions: the first amendment, as of right,[1] added a second cause

of action. The second amendment resulted from the granting of plaintiffs' cross motion to amend and enlarge the jurisdictional allegations. The plaintiffs' original complaint based jurisdiction solely upon diversity of citizenship. Upon argument of defendants' motion for summary judgment dismissing the complaint, the plaintiffs were granted leave to amend the jurisdictional allegations of the complaint to read as follows:

> "2. The matter in controversy exceeds, exclusive of interests[sic] and costs, the sum of $10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA, pursuant to 28 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

THE FACTS

The plaintiffs allege that in 1795, by a treaty negotiated

[140]

between representatives of the plaintiffs and of the State of New York, 100,000 acres of land within the defendant counties, owned by the plaintiffs from time immemorial, was deeded to the State of New York. Plaintiffs allege that they were induced to sell the land by reason of fraud practiced on them by the State of New York. They further allege that the conveyance to the State of New York was violative of earlier treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.[2]

The crux of plaintiffs' complaint is embodied in paragraph 22 of the first amended complaint, which reads as follows:

> 22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements,[3] By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

No purpose would be served trying to tack a name on the cause of action asserted, since, except for the question of civil rights jurisdiction, the jurisdictional issues will be decided independently of the name given to the claim alleged. [141]

JURISDICTIONAL BASES

DIVERSITY OF CITIZENSHIP

Since there is no disputing the New York citizenship of the defendant counties,[4] the plaintiffs, in order to preserve the required complete diversity,[5] contend that plaintiff Oneida Indian Nation of New York State (Oneida Indians of New York) is not a citizen of New York State within the meaning of 28 U.S.C. §1332.[6]

In support of this claim, they analogize the Oneida Indians of New York, an unincorporated Indian tribe, to an unincorporated labor union, which they contend under the

holding of United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.,[7] is not a "citizen" for diversity purposes. Plaintiffs' reading of this case is myopic. While an unincorporated association is not a citizen, per se, in the same sense as a corporation, the question considered and answered by the Court in the negative was "whether an unincorporated labor union is to be considered as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members." [8]

Using the standard of the citizenship of its members to determine the citizenship of the tribe results in New York citizenship for diversity purposes. The individual members of the Oneida Indians of New York are citizens of the United States[9] domiciled in New York and are consequently citizens of New York State for diversity purposes.[10]

Recognizing that "diversity is broken"[11] if the analogy

[142]

to an unincorporated labor union is carried to its logical conclusion because "some of the members of the Tribe are residents of New York * * *,"[12] plaintiffs carry the analogy only to that point at which the unincorporated association per se has no citizenship. They distinguish the Indian tribe from other unincorporated associations because the Indian tribe "has an independent sovereignty of its own"[13] and "is a nation within a nation"[14] with whom "[t]he United States for almost a century made formal treaties * * *."[15] This argument loses sight of the fact that for the last century, recognition has been denied to any Indian nation or tribe "as an independent nation, tribe, or power with whom the United States may contract by treaty."[16]

The plaintiff has not specifically asserted jurisdiction under 28 U.S.C. §1332(a)(2) or (a)(3).[17] However, even if its independent nation theory were urged as a ground for

asserting jurisdiction under these subdivisions, the argument would fail. Even before the Act of March 3, 1871, the Supreme Court had held that Indian nations or tribes are not foreign nations for federal jurisdictional purposes.[18]

FEDERAL QUESTION JURISDICTION

Federal question jurisdiction will be considered under 28 U.S.C. §§1331[19] and 1362.[20] No question has been raised as to the qualifications of the plaintiffs as Indian tribes "with a governing body duly recognized by the Secretary of the Interior * * *."[21] Nor is there any question that the amount in controversy exceeds $10,000.00. This leaves as the only open question whether [143]

"the matter in controversy arises under the Constitution, laws or treaties of the United States."[22]

Determining whether a complaint states a claim "arising under" the Constitution, treaties, or laws of the United States is usually not an easy undertaking. Despite the problems of construction posed by "arising under," the Court of Appeals for this circuit has distilled from a long line of cases criteria for "testing the complaint for sufficient assertion of a federal question * * *":[23]

> Whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state-created" claim itself presents a "pivotal question of federal law," for example because of an act of Congress must be construed or "federal common law govern[s] some disputed aspect" of the claim.[24]

In addition to this test, a number of general principles have become well established. The federal question must appear on the face of a well-pleaded complaint.[25] It is not enough that the allegations show the likelihood of a

question arising under federal law at some later juncture in the lawsuit.[26] Similarly, a case does not "arise under" federal law if the complaint merely anticipates a defense which involves federal law.[27] Nor does a suit "arise under a law renouncing a defense * * *."[28] A case "arises under" federal law when the well-pleaded complaint "discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress."[29]

[144]

Shorn of all non-essential allegations, the complaint in this case is seeking damages for defendants' use and occupancy of land. This cause of action, regardless of the label it is given, is created under state law and requires only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. None of these essential allegations calls into question the Constitution, treaties, or federal law.[30] The local property rights of numerous land owners within Madison and Oneida Counties, it seems to me, should be decided by the application of state law.[31]

Unlike a suit to remove a cloud on a title, the complaint in the present type of action need not allege the existence and invalidity of the instrument under which the defendant claims title.[32] It may well be that 25 U.S.C. §177 or the Treaty of 1795 could be called into question during the course of litigation, but such introduction would serve only to renounce a defense that title or right of possession to the land in question vested in New York State. The possible necessity of interpreting §177 or the Treaty in connection with a potential defense is insufficient to sustain federal question jurisdiction.[33]

Clearly, §177 does not create the remedy sought to be enforced in this lawsuit. The sole remedy of that section is a penalty provision in favor of the United States. Nor is this a case where the remedy sought may be inferred

from federal law.[34] The complaint, stripped of all surplusage, does not present a "pivotal question of federal law." [145]

The complaint must also fall for failing to allege facts which give this court jurisdiction under the remaining part of the McFaddin test. While Title 25 of the United States Code, as well as other laws, the Constitution and treaties, evidences a concern for the protection of Indians,[35] there is little evidence that Congressional policy demands that this type of action be heard in a United States District Court. The action here calls for a state remedy granted, if at all, under state law, not under federal common law.

CICIL RIGHTS JURISDICTION

That jursidiction does not lie under 28 U.S.C. §1343 and 42 U.S.C. §1983 requires little discussion. No matter how the plaintiffs attempt to dress it up, the complaint alleges "an action addressed solely to the taking of property"[36] which does not support jurisdiction under the quoted sections.[37] And if by some stretch of the imagination plaintiffs were to get over this hurdle, the fact that the Civil Rights Act does not apply to suits against municipalities would present an insurmountable barrier.[38]

For the reasons herein, it is

ORDERED, that the defendants' motion to dismiss the complaint be and the same hereby is granted for lack of subject matter jurisdiction.

s/ EDMUND PORT
United States District Judge

Dated: November 9, 1971
Auburn, New York

FOOTNOTES

1 Fed. R. Civ. P. 15(a).

2 1 Stat. 137, now 25 U.S.C. §177 (1964).

3 Since the treaty of 1795 dealt with 100,000 acres within the Counties of Oneida and Madison, and since the claim against the defendants relates only to "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements," it is obvious that there are, of necessity, numerous other parties, occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom like claims could be made.

4 Cowles v. Mercer County, 74 U.S. 118 (1868); Brown v. Marshall County, Kentucky, 394 F.2d 498 (6th Cir. 1968).

5 Strawbridge v. Curtiss, 7 U.S. 159 (1806).

6 28 U.S.C. §1332 (1964). This section reads, in pertinent part, as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

7 382 U. S. 145 (1965).

8 Id. at 147 (emphasis added).

[9] 8 U.S.C. §1401 (1964). See also U.S. Const., amend XIV, §1.

[10] See U.S. Const., amend XIV, §1; Pemberton v. Colonna, 290 F.2d 220 (3rd Cir. 1961). See also Matter of Heff, 197 U.S. 488 (1905); Meeks v. McAdams, 390 F.2d 650 (10th Cir. 1968); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert denied 382 U.S. 986 (1966).

[11] Plaintiffs' Brief on Issue of Jurisdiction, dated Dec. 18, 1970 at p. 6.

[12] Id.

[13] Id.

[14] Id. [147]

[15] Id.

[16] 25 U.S.C. §71 (1964), derived from Act of Mar. 3, 1871, C. 120, §1, 16 Stat. 566.

[17] 28 U.S.C. §§1332(a)(2), (a)(3) (1964). These subsections are set forth in note 6, supra.

[18] Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831).

[19] 28 U.S.C. §1331 (1964). This section, in pertinent part, reads as follows:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[20] 28 U.S.C. §1362(added Pub. L. 89-635, §1, Oct. 10, 1966, 80 Stat. 880). This section provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

[21] Id.

[22] Id; 28 U.S.C. §1331 (1964).

[23] McFaddin Express, Incorporated v. Adley Corporation, 346 F.2d 424, 425 (1965), cert. denied 328 U.S. 1026 (1966).

[24] Id. at 426. See also Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); T.B. Harms Company v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied 381 U.S. 915 (1965).

[25] Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894).

[26] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[27] Id; Hopkins v. Walker, 244 U.S. 486 (1917).

[28] Gully v. First Nat. Bank, 299 U.S. 108, 116 (1936).

[29] Hopkins v. Walker, supra at 489.

[148]

[30] See Taylor v. Anderson, 234 U.S. 74 (1914); Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929).

[31] See note 3, supra.

[32] Compare Hopkins v. Walker, supra.

[33] See Gully v. First Nat. Bank, Supra.

[34] See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

[35] Insofar as the plaintiffs may be entitled to redress against the United States, a claim is not pending before the Indian Claims Commission. See Exhibit, attached to Plaintiffs' Reply Brief on Issue of Jurisdiction; Defendant County of Oneida's Supplemental Brief, p. 5.

[36] Eisen v. Eastman, 421 F.2d 560, 564 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970).

[37] Id.

[38] Monroe v. Pape, 365 U.S. 167 (1961). See also United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3rd Cir. 1969), cert. denied 396 U.S. 1046 (1970).

Appendix D — Original Complaint.

[1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is conferred by diversity of citizenship.

3. From time immemorial, down to the time of the American Revolutionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.

4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article

IX of the Articles of Confederation and under Article L, Section 8, of the United States Constitution. Under this power, treaties were made [2]

with the Oneidas, which read in part as follows:

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States. . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

Treaty with Oneida, Tuscarora and Stockbridge Indians - Oneida 1974

> "Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

[3]

> "Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.
>
> "Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government consideres itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

> "The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

> "Section 177. Purchases or Grants of lands from Indians
>
> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

> "Section 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian [4]

shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. Section 2126."

8. In the so-called "Treaty" at Fort Stanwix in 1788, the plaintiffs purportedly ceded most of their lands (over 5,000,000 acres) to the State of New York, their former ally, for a consideration of $5500 plus an annuity of $600 per year forever. Reserved from this cession was a tract of land of about 300,000 acres located in what is now denoted the Counties of Oneida and Madison. Such tract is herein called plaintiffs' "Reservation" or "the Reservation" and is described in paragraph Second of said Treaty. A copy of the 1788 treaty is annexed to and made a part of this complaint as Exhibit "B".

9. The Reservation was still intact in 1790, at the time of enactment of the "Indian Non-Intercourse Act" (1 Stat. 137 (1790), similar in intent to Section 177 of 25 U.S.C.A.), which expressly forbade and declared invalid any sale of Indian Reservations without the consent of the United States.

10. In the year 1795 representatives of New York State met with representatives of plaintiffs and concluded another "Treaty" whereby plaintiffs purportedly deeded to the State a large portion of the Reservation. Exhibit "C", annexed, is a copy of said "Treaty" and contains a description of the lands purportedly deeded to the State. It is the lands described in Exhibit C which are the subject of this action, hereinafter called the "premises".

11. All of the Indians, representatives of plaintiffs, who signed the said "Treaty" of 1795 (herein the "Treaty")

signed with an "X" in place of a signature indicating, on information and belief, that they could not read or write.

12. At the time of making of said "Treaty" of 1795, the federal law forbidding sale of Indian lands without consent of the United States was in full force and effect, and the premises were lands subject to such law. See 1 Stat. 329 (1793). No federal [5]

consent, on information and belief, was ever obtained to such purported deed to the State. On information and belief, no U.S. Commissioner was present at the negotiations or the execution of such purported "Treaty". On information and belief, the U.S. has never approved or ratified such purported "Treaty", and the purported transfer is invalid under federal law.

13. On information and belief, the consideration to be paid to plaintiffs under such "Treaty" was based on a perpetual annuity of Three Dollars a year for every hundred acres (3 cents per year per acre), which computed at 6% amounts to a principal price of fifty cents per acre.

14. In the period 1792-1795, the Holland Land Company through its agent, John Lincklaen of Cazenovia, was selling nearby land (just south of the premises) at from $1.50 to $4.00 per acre unimproved. From 1795 to the early 1800's, nearby land was sold to settlers at $4.00, $5.00 and $6.00 per acre.

15. The lands (the premises) purchased for $0.50 per acre from plaintiffs in 1795 were sold off in 1797 to settlers and developers for a consideration fixed by state law at $3.53-1/2 per acre. This represented a profit to the state of $3.03-1/2 per acre on the premises, a 500% profit in two years.

16. On information and belief, the representatives of New York State misrepresented to plaintiffs the value of

their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties

[6]

of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least $10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs damand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS

($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

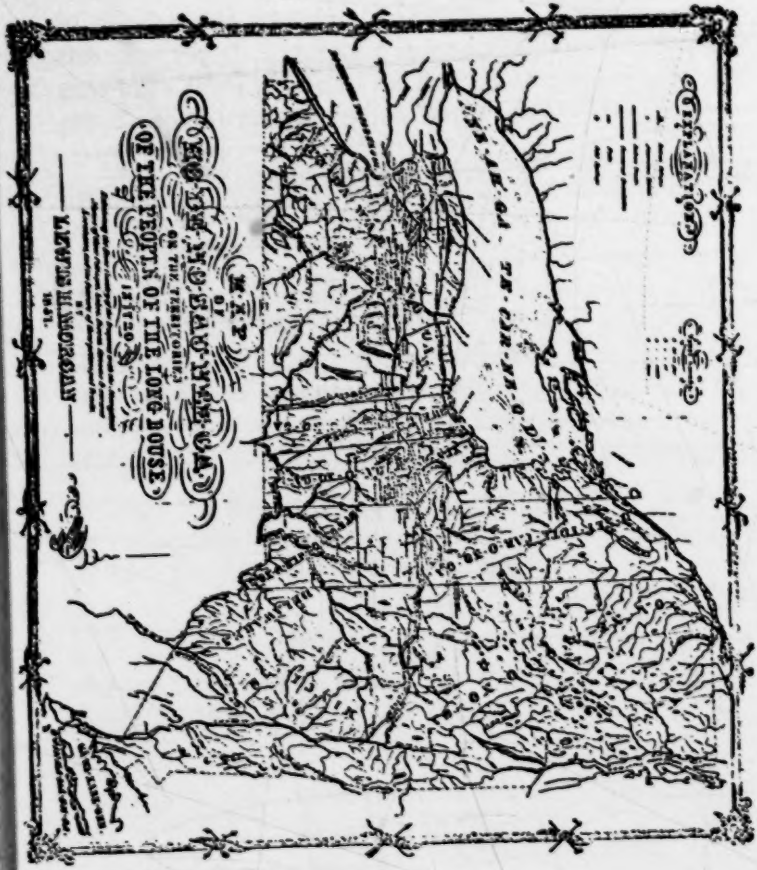
By _____

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

—

Appendix D — Original Complaint.
Exhibit A — Map annexed.

[7]



Appendix D — Original Complaint.
Exhibit B — Treaty of 1788 annexed.

Fort Stanw[illegible]

No. 51.] 237

11 STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas — it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract, to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tinnaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Canaserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner alienated or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent

frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollers in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a

further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation. and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

Appendix D — Original Complaint.
Exhibit B — Treaty of 1788 annexed.

PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND'YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYAKO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, Juss.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)

Witnesses present

Appendix D — Original Complaint.
Exhibit B — Treaty of 1788 annexed.

[12]

The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,
Miss'y & Interpreter.
J. B. CHRS. DEST,
Trys.
ABM. ROSEKRANTZ,
SIMEON DeWITT,
Surv. Genl.,
SAMUEL LATHAM MITHCELL,
JOHN TAYLER,
WM. COLBRATH.

Know all Men by these presents that We the Sachems Warriors and Women of the Oneida Nation of Indians in full Council assembled Have nominated constituted and appointed and by these presents Do nominate constitute and appoint Our Brothers of the said nation Peter Hanoughgwinya John Shawondo, Martinus Atsbinha, Paul Otsbetogon of the Wolf Clan, Anthony Shononghriyo William Taghtaghgivijere John Onontiyo Thomas Tehohearitha of the Turtle Clan and Joseph Ogeaghratarighahea Nicholas Sagovakarongo Nicholas Tehotakarion and Kamyoton of the Bear Clan Our lawful deputies and attornies for us and in Our name and in our behalf to treat with the Commissioners appointed by an act of the Legislature of the State of New York entitled "an act for the better support of the Oneida Onondago and Cayuga Indians and other purposes therein mentioned" and to bargain sell release and confirm unto the People of the said State all our right title interest Claim and demand whatsoever of in and to such part or parts of the lands within said State

Appendix D — Original Complaint.
Exhibit C — Treaty of 1795 annexed.

[13]

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner

thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

Whereas Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two

Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz! Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to

convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained in the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith of part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

JOHN his x mark SKANONDO [L. S.]

WILLIAM his x mark TAGHTAGHGIVESIRE [L. S.]

ANTHONY his x mark SHONONGHIYO [L. S.]

JACOB REED [L. S.]

MARTINUS his x mark ALSHINSHA [L. S.]

PETER his x mark BREAD [L. S.]

JACOB his x mark DOXTADER [L. S.]

THOMAS his x mark TEHOHEARIETHA [L. S.]

CHRISTIAN his x mark KANYARODON [L. S.]

JOHN his x mark DENNY [L. S.]

JOSEPH his x mark HOT ASHES [L. S.]

THANJOTON his x mark [L. S.]

NICHOLAS x JEHOTSKARIAON [L. S.]

MOSES his x mark CHAHAGIGHTE [L. S.]

PETER his x mark TEKAWIGATIGHRON [L. S.]

Appendix D — Original Complaint.
Exhibit C — Treaty of 1795 annexed.

[17]

EZEKIEL his mark SHAWSTAGOWA [L. S.]

JOHN JOURDAN [L. S.]

ELEAZAR his mark SHANEWIS [L. S.]

PAUL his mark TEHONEVATASE [L. S.]

ABRAHAM his mark ONEGERENGHTE [L. S.]

PH. SCHUYLER [L. S.]

JOHN CANTINE [L. S.]

D. BROOKS [L. S.]

Sealed and delivered in the presence of.
NOTE. The words "four miles distant from the Eastern Boundary of the Tract so appropriated as aforesaid, thence Northerly by strait lines parallel to the Eastern boundary "lines of the Lands so appropriated and and keeping four miles distant therefrom until it reaches a place," were interlined before Execution—interlined between the twelfth & thirteenth Lines, between the words *Point* and *four*—the words *appropriated* throughout the whole of the above Instrument written on Erasures before the Execution thereof.

EPH^M VAN VEGHTEN,
JAMES DEAN.

STATE OF NEW YORK

Be it remembered that on the Sixteenth day of September One thousand seven hundred and ninety five personally appeared before me Egbert Benson Esquire one of the Judges of the Supreme Court of the said State James Deane one of the within subscribing Witnesses who being duly sworn did depose that he saw Philip Schuyler, John Cantine and David Brooks the agents therein named and the twenty Indians whose names are thereto subscribed seal &

Appendix D — Original Complaint.
Exhibit C — Treaty of 1795 annexed.

[18]

deliver the within Indenture, and that he the deponent subscribed his name as a Wittness thereto, and saw Ephraim Van Vechten the other Wittness also subscribe his name thereto, and I having Inspected the same and not finding any erazures or Interlineations therein other than those noted to have been made before Execution do allow it to be Recorded.

EGBT BENSON—

The preceding Instrument is a true Copy of the Original words *first above written* last line page 177 and words "*Ph: Schuyler (L S) John*" 10th line page 178 written on Erasures and word *said* at 11th line page 174 interlined Compared therewith this 28th day of March 1796 By Me

LEWIS A. SCOTT,
Secretary

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York.....

The said Indians having in the month of March last Proposed to the Goveronor of the said State to cede the Lands herein after described, for the compensation herein after mentioned—and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Nowageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation—And also the same

Appendix D-1 — Amendment to Complaint.

[22]

(SAME TITLE).

Plaintiffs hereby amend their complaint in the above-entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By s/ GEORGE C. SHATTUCK

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

Appendix D-2 — Second Amendment to Complaint.

[136]

(SAME TITLE).

This cause coming on to be heard upon the plaintiffs' motion for leave to file an amendment to their complaint herein and for an order that this cause be heard upon the plaintiffs' complaint as thus amended, and it appearing that justice requires that their motion be granted, and this Court being fully advised,

IT IS ORDERED, that the complaint herein be amended so that paragraph 2 thereof shall read as follows:

> "2. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

[137]

and it is further

ORDERED, that defendants' motion to dismiss the complaint be deemed made against the complaint as so amended.

Dated, December 2, 1970

s/ EDMUND PORT
United States District Judge